9-12-2009

Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust Appellant's Reply Brief Dckt. 34873

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Case Number 34873

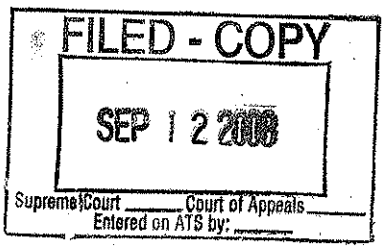
THE MARK WALLACE DIXSON IRREVOCABLE TRUST,

CROSS-CLAIMANT-RESPONDENT,

v.

TAMMIE SUE DIXSON,

CROSS-DEFENDANT-APPELLANT.



Appealed from the Fourth Judicial District of the State of Idaho,
In and for the County of Ada.
The Hon. Judge Thomas A. Neville, District Judge, Presiding.

CROSS-DEFENDANT/APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Spousal consent was not obtained and therefore the change of beneficiary is ineffective.

Appellant, Tammy Dixson ("Tammy") asserts that Idaho Code § 41-1803 governs the nature of the Banner Life Insurance Policy (the "Policy") at issue in this case. Tammy's position is that the Policy which insured her husband, Mark Dixson, is her separate property pursuant to Idaho Code § 41-1803 and that the Trial Court erred in failing to apply Idaho Code § 41-1803 in this case. Tammy relies not only upon Idaho Code § 41-1803 as the basis for her appeal of the Trial Court's decision, but also relies upon the terms of the Policy which require that the insured's spouse consent to any change of beneficiary by designating such consent in writing on the Change of Beneficiary Form provided by the insurer.

The Mark Wallace Dixson Revocable Living Trust (the "Trust") contends that Idaho Code § 41-1803 is inapplicable to the instant case and that it "excludes situations where the terms of the policy provide for something other than is provided by the statute." (*Respondent's Brief*, p. 10). The Trust emphasizes that the Policy provides for a change in beneficiary, thus taking the Policy outside of the application of Idaho Code § 41-1803. The Trust further concedes that a change in beneficiary "can only be accomplished in the manner pointed out in the policy," and that "any attempt to make such change in any other manner is ineffectual." (*Respondent's Brief*, p. 10, *citing Noyes v. Noyes*, 106 Idaho 352, 356, 649 P.2d at 156 (Ct.App. 1984).

In this case, Mark Wallace Dixson ("Mark") attempted to change the beneficiary of the Policy by execution of a Change of Beneficiary Form provided by the

insurer, Banner Life, through his attorney-in-fact, Robert Young. The Policy provides for the method of filing a change of beneficiary form (R. Vol. I, P. 41). The Change of Beneficiary Form, which requires that a spouse in the State of Idaho evidence his or her consent to the change of beneficiary by signing the Change of Beneficiary Form, is a part of the insurance contract. Idaho Code § 41-1802 defines an insurance policy as "...the written contract of or written agreement for or effecting insurance, by whatever name called, and includes all clauses, riders, endorsements and papers which are a part thereof." The Change of Beneficiary Form becomes a part of the insurance contract. There is no dispute that Tammy did not sign the Change of Beneficiary Form, nor was she ever asked to. Tammy did not consent to the change of beneficiary, removing her as the beneficiary of her husband's life insurance policy. (R. Vol. I, P. 41; P. 102A, ex 8, ¶. 27).

The Trust seeks to have this Court apply the terms of the insurance contract in order to circumvent Idaho Code § 41-1830, but conveniently ignores the fact that the insurance contract includes the Change of Beneficiary Form and that such form requires written spousal consent to the change in beneficiary. Application of the Trust's argument for the application of the Policy terms requires that spousal consent be given. The trial court erred in failing to enforce the Policy terms.

The Trial Court erred in failing to apply Idaho Code § 41-1830 by holding that Idaho Code § 41-1830 does not create an exception to community property law. The Trust cites the Revised Code of Washington 48.18.440(1) and the Washington Supreme Court's decision in *Madsen v. Comm'n of Internal Revenue,* 97 Wash.2d 792, 650 P.2d 196 (1982), *overruled on other grounds,* in support of its argument that Idaho Code § 41-

1830 does not convert community property life insurance policies into the sole and separate property of the beneficiary spouse. The Court in *Madsen* was confronted with question of whether RCW 48.18.440(1) converted "community property life insurance policies into the sole and separate property of the beneficiary spouse." *Id.* The Washington Supreme Court held that "the statute was limited to the 'proceeds' of a policy and did not change the community character of the underlying policy, despite statutory language indicating that the policy was to 'inure to the separate use' of the beneficiary spouse." *Id.* at 799-800. The Court in *Madsen* noted that RCW 48.18.440(1) "does not alter the general rule that absent clear and convincing proof to the contrary, the proceeds of a life insurance policy purchased with community funds retain the community property character of the funds used to purchase the policy." *Id.* at 799.

Thus, even applying this analysis to Idaho Code § 41-1830, the Trust would need to present clear and convincing evidence that the insurance policy was not purchased with community funds. Tammy's position is that the policy was purchased during the marriage, and was paid for with community funds. There is a genuine issue of material fact with regard to whether the premiums paid by Cory Armstrong were a gift solely to Mark, or to the community. Given that Tammy's recollection, as set forth in her sworn statement, contradicts with Cory Armstrong's statements, there is not clear and convincing evidence that the funds used to pay the last Policy premium were not community. The "manner and method of acquisition of property, as well as the parties' treatment of that property, are questions of fact." *Krebs v. Krebs,* 114 Idaho 571, 573, 75 P.2d 77 (1988). The Magistrate's conclusion in the case at bar that the premium payments were gifts to Mark, thereby making the premium payments Mark's separate property,

ignores the disputed facts which are material to this case.

The Trust also argues Idaho Code § 41-1830 is unconstitutional on the basis that it violates the Equal Protection Clause of the Fourteenth Amendment. This argument is likewise without merit and must be rejected. The District Court did not make a determination of the constitutionality of Idaho Code § 41-1830 on the basis that the District Court did not intend to rely upon Idaho Code § 41-1830 in making its ruling. (Tr. Vol. I, P. 29, ll. 14-25). The District Court declined to rule on the constitutionality of Idaho Code § 41-1830 in its *Memorandum Decision and Order.* (R. Vol. I, P. 82).

The Trust's assertion that Idaho Code § 41-1830 is unconstitutional was addressed in length in the *Reply Memorandum in Opposition to the Mark Wallace Dixson's Motion for Summary Judgment and In Support of Tammie Sue Dixson's Motion for Summary Judgment.* It is Tammy's position that Idaho Code § 41-1830 does not give a preference to women only to the detriment of males. The statute simply provides that "every policy of life insurance... made payable to or for the benefit of a married woman... whether procured by herself, her husband... shall inure to her separate use and benefit." Idaho Code § 41-1830. The statute simply creates a separate property interest in the proceeds of the life insurance policy. In this sense, the statute is distinguishable from the statutes found to be unconstitutional in *Reed v. Reed,* 404 U.S.71, 75-76, 92 S.Ct. 251, 253-54, 30 L.Ed.2d 225 (1971) (preference to males over females to administer an estate) and *Orr v. Orr,* 440 U.S. 268, 99 S.Ct.1102, 59 L.Ed.2d 225 (1979) (invalidating a statute providing that wives, but not husbands could receive alimony). There is nothing in Idaho Code § 41-1830 which prohibits an insurance policy payable to or for the benefit of a married man as his separate property. Therefore, the statute clearly does exclude

males from the class of persons entitled to receive insurance proceeds, and is not in violation of the equal protection clause of the constitution.

And, in any event, even a finding that the statute is unconstitutional on its face, it is not necessarily and automatically nullified. The Idaho Court of Appeals has held that "a determination of constitutional infirmity does not conclude the case." *Nevau v. Nevau* 103 Idaho 707, 709, 652 P.2 655, 657 (Idaho Ct. App.1982), *citing Orr vs. Orr,* 440 U.S. 279, 99 S.Ct. at 111. The Court in *Nevau* recognized that a determination of constitutional infirmities does not nullify the statute if the statute could be upheld on other grounds. (*see e.g., Nevau v. Nevau* 103 Idaho 707, 709, 652 P.2 655, 657 (Idaho Ct. App.1982), *citing Orr v. Orr,* 440 U.S. 279, 99 S.Ct. at 111.) The reasoning expressed by the Court of Appeals in *Nevau* is applicable to the case at bar. Specifically, it is clear that the legislature intended, pursuant to Idaho Code § 41-1830 and its predecessor, Idaho Code § 1401, that when a wife is named as a beneficiary to a life insurance policy, that the proceeds are her separate property. As noted above, there is nothing in the statute which prevents a life insurance policy to be taken out on the wife's life naming the husband as the beneficiary. As such, Idaho Code § 41-1830, even if the statute is found to be unconstitutional, it can be extended to provide for the husband to have a separate property interest, rather then to nullify the statute as to the husband's right. Given the analysis for determining the constitutionality of such statutes as approved by and utilized by the Idaho appellate courts, the Trust's argument that Idaho Code § 41-1830 is unconstitutional must be rejected.

B. It is inequitable to allow profit by direct and intentional violation of the Joint Temporary Restraining Order

The Trust's argument that the Joint Temporary Restraining Order did not apply because the Policy was Mark's separate property and "it was not held for the benefit of the parties..." is invalid because it is premised upon the erroneous conclusion that the Policy was Mark's separate property. (*Respondent's Brief* at p. 22). The Trust argues at the outset of its brief that the Policy terms govern the change of beneficiary. Tammy agrees that the insurance contract itself, which encompasses all policy terms, riders, endorsements, and policy forms, governs the protocol for changing a beneficiary. It follows, then, that in order to effectively change the beneficiary from Tammy to Jackie Young, Mark or his agent, would be required to complete all required portions of the Change of Beneficiary Form. The Change of Beneficiary form requires that Tammy consent to the change of beneficiary. This requirement is not hidden or in fine print, but is found directly below the signature line where Robert Young signed the Change of Beneficiary Form on not one, but two, occasions. Given that the Policy terms were not, by the Trust's own admission, complied with, the purported Change of Beneficiary Form is invalid.

The Trust's argument that the Joint Temporary Restraining Order did not apply to the Policy is also without merit because the Joint Temporary Restraining Order required the parties to the pending divorce action initiated by Mark, to "maintain the status quo regarding their property." (R. Vol. I, P. 102A, ex 8, ex 14 and ex A thereto.) Thus, even if the property was arguably, at the time of the divorce filing, Mark's separate property (which Tammy disputes), the Joint Temporary Restraining Order prohibited Mark from making any changes until the divorce court could characterize the nature of the Policy as

separate property or community property. The purpose of the Joint Temporary Restraining Order, as set forth in *Appellant's Brief* and the cases cited therein, is to ensure that neither party disposes of any asset during the pendency of the divorce. The Court can not hold Mark in contempt for the violation of the Joint Temporary Restraining Order because he is deceased. Tammy had no knowledge of the attempted change of beneficiary until after Mark's death, so she could hardly challenge the validity of the change during the divorce action. The Trust cites *Alloway v. Smith,* 70 Arz. 364, 370, 220 P.2d 857, 861 (1950) for the proposition that transfers made to "innocent third parties" are not void or voidable. (*Respondent's Brief* at p. 23). The *Alloway* case is factually distinguishable. In the instant case, there was not a transfer to an innocent third party; rather, the attorney-in-fact for Mark, who had knowledge of the divorce proceeding, transferred the property which was subject to the terms of the Joint Temporary Restraining Order and stood to profit from the transfer. The Trust which is the party to this action was not the proposed beneficiary. Jackie Young was the beneficiary named without Tammy's consent or knowledge.

The Trust cites *Davis v. Prudential Ins. Co. of America*, 331 F.2d 346 (5th Cir. 1964) for the proposition that the effect of the injunction does not void the prohibited transfer. The *Davis* court recognized that a fraud had been perpetrated by the decedent in changing the beneficiary of his life insurance policy and held that the wife was in fact entitled to her community interest in the proceeds. The Court in *American Family Life Insurance Company v. Noruk*, 528 N.W.2nd 921 (Minn. 1995), held that

> [W]hen a life insurance policy's designated beneficiary is changed in violation of a dissolution court's temporary order, and the death of one of the parties intercedes before a final judgment is rendered, equitable considerations control in

> determining the ownership of policy proceeds...The decedent's wrongful act should be considered in determining the relative equities of the proceed claimants...Other factors, such as the wrongfulness of third parties' conduct, distribution of the marital estate after the insured's death, marital debts for which the surviving spouse remained liable, and likelihood spousal maintenance would have been awarded to the surviving spouse, should also be considered.

Id.

The Court in *American Family Life Insurance* reasoned that its decision would "not encourage wholesale disobedience of temporary court orders..." and recognized that this issue "arises only in limited circumstances: when the insured who wrongfully changes his beneficiary dies between the issuance of the restraining order and a final resolution in the dissolution action." *Id.*

The application of the foregoing equitable analysis is appropriate to the instant case. The Respondent's position that the violation of the Joint Temporary Restraining Order can only be remedied by a contempt action is not practical in a situation such as the one presented in the instant case.

C. The District Court improperly awarded attorney fees pursuant to Idaho Code §§ 12-120(3) and 15-8-208.

The Respondent argues that the District Court awarded attorney fees pursuant to Idaho Code § 12-120(3). In support of this position, the Respondent cites *Continental Cas. Co. v. Brady,* 127 Idaho 830, 835, 907 P.2d 807, 812 (1995) for the proposition that an insurance contract is a "commercial transaction" pursuant to Idaho Code § 12-120(3). The Respondent's reliance upon Brady is misplaced. After Brady was decided, the Idaho Legislature, in response to the holding in Brady, amended Idaho Code § 41-1839. Idaho Code § 41-1839 now provides as follows:

> ALLOWANCE OF ATTORNEY FEES IN SUITS AGAINST INSURERS. (1) Any insurer issuing any policy, certificate or contract of insurance, surety,

> guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action.
>
> (2) In any such action, if it is alleged that before the commencement thereof, a tender of the full amount justly due was made to the person entitled thereto, and such amount is thereupon deposited in the court, and if the allegation is found to be true, or if it is determined in such action that no amount is justly due, then no such attorney's fees may be recovered.
>
> . . .
>
> (4) Notwithstanding any other provision of statute to the contrary, this section and section 12-123, Idaho Code, shall provide the exclusive remedy for the award of statutory attorney's fees in all actions between insureds and insurers involving disputes arising under policies of insurance. Provided, attorney's fees may be awarded by the court when it finds, from the facts presented to it that a case was brought, pursued or defended frivolously, unreasonably or without foundation. Section 12-120, Idaho Code, shall not apply to any actions between insureds and insurers involving disputes arising under any policy of insurance.

Brady involved a claim by Brady against his insurance company for failure to defend and failure to indemnify. The Respondent attempts to boot strap the holding in *Brady* that any claim for the proceeds of an insurance policy is a "commercial transaction." The Respondent fails to take into consideration that the inquiry is not whether a "commercial transaction" is remotely involved in the litigation, but, rather, whether the "commercial transaction" is the gravaman of the lawsuit. The Court has stated the proper inquiry as follows:

> [T]he award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit. Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. To hold otherwise would be to convert the award of attorney's fees

> from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filed.

Brower v. E.I. DuPont De Nemours and Co., 117 Idaho 780, 784, 792 P.2d 345, 349 (1990).

While this Court has held that the fact that simply because the nature of the lawsuit is that of a declaratory action does not prevent an award of attorney fees pursuant to Idaho Code §. 12-120(3), *see Frieburger v. J-U-B Engineers*, 141 Idaho 415, 111 P.3d 100 (2005), the commercial transaction must be integral to the claim.

In this case, the insurance policy is not the gravamen of the lawsuit. The nature of the claim is the entitlement to the proceeds of the insurance policy. In other words, it is not a claim by the parties against the insurance company for the proceeds of the policy payment, but a claim between Tammy and the Trust that is central to the lawsuit. The gravamen is the death of Mark Dixson and the entitlement to the death proceeds. There is no commercial relationship between the parties.

II. CONCLUSION

Appellant respectfully requests that this Court reverse the District Court's grant of Summary Judgment in favor of the Trust for the reasons set forth in *Appellant's Opening Brief* and the foregoing.

RESPECTFULLY SUBMITTED: This 12th day of September, 2008.

FINCH & ASSOCIATES LAW OFFICE, P.A.

By: _____
Michelle R. Finch

RESPECTFULLY SUBMITTED: This 12th day of September, 2008.

ELLSWORTH, KALLAS, TALBOY & DEFRANCO, P.L.L.C.

By _____
Robert W. Talboy

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2008, two true and correct copies of the within and foregoing document were served via hand delivery on the following:

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